Petition

81-1235

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NO._____

in the United States Supreme Court

1981 Term

C. ARTHUR McINTOSH,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents for review the following questions:

(1) Whether or not proof of materiality is essential to establish a violation of 18 U.S.C. §1001.

(2) If materiality is an essential element, what is the definition and standard of proof for materiality?

(3) Was the Petitioner deprived of his Sixth Amendment right to a jury trial by virtue of the trial court's refusal to submit the factual aspects of the materiality issue to the jury?

(4) Was the Petitioner deprived of the "fair notice" element of due process by virtue of the Court of Appeals' adoption on review of his case of an altogether different and less stringent standard of proof and

definition of materiality than that utilized prior to his case?

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CITATION TO THE OPINION BELOW

The decision sought to be reviewed is that of the United States Court of Appeals for the Fifth Circuit in United States of America vs. McIntosh, 655 F.2d 80 (5th Cir. 1981), a copy of which is set forth fully in the Appendix.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S. §1254 (1). The opinion and judgment sought to be reviewed were issued on September 4, 1981, and entered on or about September 25, 1981. A timely Petition for Rehearing and Suggestion of Rehearing En Banc were filed, which were denied on October 6, 1981, notice of which was given to Petitioner's attorney on or about October 9, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of 18 U.S.C §1001 is as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The Sixth Amendment to the United States Constitution is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

> and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fifth Amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner was a practicing attorney in Cleveland, Mississippi, for approximately 15 years. During that time, he became acquainted with a farmer named W. T. (Bo) Tullos. A close personal friendship developed between the two that exceeded the ordinary attorney-client relationship. On occasion, McIntosh would perform free legal services for Tullos if Tullos were having difficult times financially.

In February of 1979, Tullos borrowed approximately $206,000.00 from the Farmers Home Administraton in order to consolidate outstanding debts so he could continue his farming operation. Although Federal regulations required that any liens and encumbrances against his land be removed, and that all personal

judgments be satisfied, Tullos himself was responsible, subject to approval by the Farmers Home Administration for deciding which debt on open account and how much on each of these debts he wished to pay with the proceeds of the Farmers Home Administration loan. In applying for the loan, he listed amounts on each open account in the approximate amount he wished to pay, but this application was revised subsequently by him with the approval of the Farmers Home Administration. The loan was closed on February 14, 1979, by the Petitioner, the attorney chosen by Mr. Tullos to close the loan. In consideration of the loan, Mr. Tullos executed a note and deed of trust to Farmers Home Administration which put the government in a secured position that would not have been affected by any failure to pay the open accounts listed.

The loan check was endorsed over to the Petitioner, who deposited it into an escrow account for disbursement. Petitioner proceeded to make disbursement of the funds from the account. On March 9, 1979, pursuant to Farmers Home Administration regulations, Petitioner submitted to Farmers Home Administration a loan closing statement certifying that he had paid all of the open accounts listed on the amended application for the loan. In fact, however, four open accounts totaling $5,000.00, or approximately 2.4 percent of the loan amount, had not been paid at that time, although Petitioner did pay all of them by August of that year, well before the Grand Jury that indicted him was convened.

On the loan closing statement, the Petitioner did disclose that he had paid himself a fee of $2,000.00, an amount in excess of the authorized amount.

The purposes for which this loan closing statement is regularly used by the Farmers Home Administration is unknown, as there was no testimony adduced at trial as to its intended or actual use. The Director of the Farmers Home Administration did testify extensively as to the purposes of the Farmers Home Administration program in general, but there is no testimony in the record pertaining to the intended or actual purpose or use of the loan closing statement, nor is there any testimony in the record concerning any decisions or actions which the Farmers Home Administration is required to make in reliance on the form. Likewise, there is no testimony in the record indicating what, if anything, the Farmers Home Administration could have done or would have done if an accurate statement had been filed showing that all particulars

of the disbursements were not totally in accord with the instructions. Also, there was no testimony that the disaster loan program was substantially impaired or subverted as a result of the late payments or the filing of the inaccurate loan closing statement.

The Petitioner was tried in the United States District Court for the Northern District of Mississippi, Western Division, in which the jury on September 9, 1980, returned verdicts of not guilty on six counts charging him with embezzlement of government funds, and returned a verdict of guilty on one count charging the Petitioner with filing a false statement in violation of 18 U.S.C. §1001.

At the close of the government's evidence, the Petitioner moved the Court for a directed verdict of acquittal on the grounds that the Government had

failed to offer any proof as to the materiality of the alleged misstatement. The Court denied this Motion, as well as a post-trial motion based on the same grounds. The record is ambiguous as to whether the Court made its own decision as to materiality, or submitted the issue to the jury. In overruling the Petitioner's motion for acquittal, the trial court stated that "the Court is of the opinion that the execution and filing of this loan statement with the Farmers Home Administration does have a tendency to deceive the government agency. ...I'm going to overrule the motion; let you take it to the jury." Then, however, the Court instructed the jury that "whether or not loan funds have been disbursed in accordance with the Farmers Home Administration's instructions is a fact material to the proper function of the [FmHA] loan

program." For all practical purposes, this charge amounted to a directed verdict of conviction.

Furthermore, the definition of materiality used by the Court was whether or not the statement had a "tendency to deceive" the government agency; not whether it had a "tendency to influence" an agency decision.

The Petitioner objected to all of these errors, which the trial court declined to correct.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which on September 4, 1981, affirmed the conviction, holding that proof of a statement's "capacity to deceive" was sufficient proof of materiality.

ARGUMENT

Most Circuit Courts of Appeal are in agreement that materiality is an essential element of a violation of 18 U.S.C. §1001. See, e.g., United States vs. Krause, 507 F.2d 113 (5th Cir. 1975); but see United States vs. Aadal, 368 F.2d 962 (2nd Cir. 1966).

Materiality is defined differently, however, by the various circuits. For example, the Ninth Circuit has defined a material statement in a §1001 context as one which is "calculated to induce reliance," United States vs. Goldfine, 538 F.2d 815 (9th Cir. 1966), or one that is "capable of influencing agency action." United States vs. Talkington, 589 F.2d 815 (9th Cir. 1978). See also Robles vs. United States, 279 F.2d 401 (9th Cir. 1960) (Test for materiality is whether statement has natural tendency

to influence agency action) cert. denied 365 U.S. 836, (1961).

Until September 4, 1981, the Fifth Circuit's position on materiality and its definition thereof were substantially in line with other circuits. Specifically, the Fifth Circuit defined a material misstatement as one which "has a natural tendency or capacity to influence an agency decision required to be made." See, e.g., United States vs. Beer, 518 F.2d 168 (5th Cir. 1975); United States vs. Brumley, 560 F.2d 1268 (5th Cir. 1977); United States vs. Guthartz, 573 F.2d 225 (5th Cir. 1978); United States vs. Krause, 507 F.2d 113 (5th Cir. 1975); and United States vs. McGough, 510 F.2d 598 (5th Cir. 1975).

The Fifth Circuit has differed with other Circuits on the question of whether materiality is an issue for the court or the jury, taking the position that

the position that materiality is a question of law for the court, United States vs. Winkle, 587 F.2d 705 (5th Cir. 1979), cert. denied, 444 U.S. 827; United States vs. Schaffer, 600 F.2d 1100 (5th Cir. 1979), although the decision must rest upon a factual, evidentiary showing. United States vs. Beer, supra. Other circuits have taken a conflicting view and submit the question of materiality to the jury. See, e.g., United States vs. Johnson, 284 F.Supp. 273 (W. D. Mo., 1968), aff'd, 410 F.2d 38, (8th Cir.) cert. denied, 396 U.S. 822 (1969); Blake vs. United States, 323 F.2d 245 (8th Cir. 1963); Gonzales vs. United States, 286 F.2d 118 (10th Cir. 1960). The Ninth Circuit expressed an even more demanding standard in United States vs. Talkington, 589 F.2d. 415 (9th Cir. 1968). In that case, the conviction was reversed because the jury

was not instructed that each and every one of the five allegedly false statements on a form submitted to the government must be found by the jury to be material. The Court of Appeals vacated the conviction because the record did not clearly indicate a specific finding by the jury of each essential element of a crime charged under §1001 as it related to each of the five allegedly false statements.

In the case presently under review, the Fifth Circuit has not only denied Petitioner of his right to have the factual basis of the materiality issue submitted to the jury, but also has departed so far from its own precedent as to amount to a violation of Petitioner's right to fair notice of what constitutes a crime under §1001.

Specifically, the Court has abandoned its long-held "capacity to influence" test for materiality, substituting instead a

"capacity to deceive" standard. This, however, has been the test for specific intent, not materiality, under §1001. For example, in United States vs. Godwin, 566 F.2d 975 (5th Cir. 1978), the court held that specific intent and materiality are two of the five essential elements of a violation of 18 U.S.C. §1001, and held further that "specific intent" was shown when the false statement had a "capacity to deceive." In no way has any prior decision of the Fifth Circuit ever held that materiality exists where a false statement merely has a "capacity to deceive". By sanctioning this test, the Fifth Circuit has put itself in conflict with most other circuits, and has departed from its own prior holdings.

In addition, the trial court instructed the jury that materiality existed in this case, which deprived the Petitioner of his right to a jury trial

on all issues of fact. The court did instruct the jury on materiality under the erroneous standard discussed supra, but its further instruction that materiality existed deprived the Petitioner of his right to a jury trial on all issues of fact underlying each essential element of the crime charged.

Materiality is an essential element of the crime charged under 18 U.S.C. §1001, and therefore the government must prove it beyond a reasonable doubt. United States vs. Barrera, 542 F.2d. 1250, 1255 (5th Cir. 1977). Unlike technical elements such as venue, which need be shown only by preponderance of evidence, see United States vs. White, 611 F. 2d 531 (5th Cir. 1980), materiality is a major, substantive element. United States vs. Godwin, supra; United States vs. Beer, supra. The judge may not invade a criminal defendant's

constitutional rights by taking from the jury any essential element. Cassella vs. United States, 449 F.2d 277 (3rd Cir. 1971), cert. denied, 405 U.S. 929 (1972).

In this case, the trial court never made a specific finding that it was convinced beyond a reasonable doubt that materiality had been proven. Furthermore, it did not instruct the jury on the proper law existing at that time in the Fifth Circuit, even though it did instruct the jury that materiality existed. Under these circumstances, the Petitioner stands convicted of a felony without really knowing who has found him guilty. Regardless of who, if anyone, had made a finding of materiality beyond a reasonable doubt, the finding has been made under a standard of conflict with that not only in other circuits, but within the Fifth Circuit as well.

CONCLUSION

For all of the foregoing reasons, certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-3793

UNITED STATES OF AMERICA
Plaintiff-Appellee

VERSUS

C. ARTHUR McINTOSH
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 4, 5 Cir. 1981, _____ F. 2d _____).

(October 6, 1981)

Before: CHARLES CLARK, TATE and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the

suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Charles Clark
CHARLES CLARK
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-3793

UNITED STATES OF AMERICA
Plaintiff-Appellee

VERSUS

C. ARTHUR McINTOSH
Defendant-Appellant

September 4, 1981

Before CHARLES CLARK, TATE and SAM D. JOHNSON, Circuit Judges

C. Arthur McIntosh, a Cleveland, Mississippi attorney, appeals his judgment of conviction for making false statements to the Farmers Home Administration (FmHA) in violation of 18 U.S.C. section 1001. McIntosh argues that the Government failed to prove his false statement was "material" as required by section 1001. He also contends that he was prejudiced by the district court's refusal to dismiss or sever six counts

of the indictment which charged him with embezzling government funds. We find adequate proof of materiality and no error in the trial court's refusal to dismiss or sever. Accordingly, we affirm McIntosh's conviction.

I.

At his request the FmHA approved McIntosh as a loan closing attorney. The terms of this approval required McIntosh to maintain his own professional liability insurance and a fidelity bond payable to the FmHA, to maintain a bank escrow account into which all funds received would be deposited, to close loans in accordance with FmHA instructions, and to furnish the FmHA promptly after each loan closing a properly completed loan closing statement form.[1]

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[1]The "Agreement to Provide Loan Closing Services" took the form of a request from McIntosh with an approval by FmHA officials.

Footnote 1 Continued:

It provided in pertinent part:

> I request your designation as an approved loan closing attorney... If my request is approved, I agree:
> * * * * * * *
> To maintain Lawyer's Professional liability insurand in the amount of at least $100,000.
> * * * * * * *
> To maintain for a period in which I am such escrow agent and have custody or control of FmHA funds, funds of lenders insured by FmHA or FmHA applicants' funds (all of which will be hereinafter referred to as FmHA funds) a fidelity-type bond to insure against fraudulent or dishonest act or acts and to provide such bond to FmHA. Also, to maintain for each employee or staff associate having access to the FmHA funds a fidelity bond to cover any fraudulent or dishonest acts and to provide a copy of such bond to FmHA. Such bond or bonds will be in the amount of at least $10,000. To maintain a fidelity bond on each of my employees or agents having access to the escrow funds for closing FmHA loans in the amount of at least $40,000 for each employee or agent.
> * * * * * * *
> To close these transactions in

Footnote 1 Continued:

accordance with FmHA Instruction 427.1 and any other specific instruction issued to me by the State Director, County Supervisor, or other authorized official of FmHA or by any attorney or official of the Office of the General Counsel of the United States Department of Agriculture.

To maintain a bank account as an escrow account for the FmHA funds and to deposit in such account all such funds received by me.

To disburse such funds in accordance with instructions sent to me by the Farmers Home Administration.

* * * * * * *

To furnish FmHA promptly after each loan closing form FmHA 427-17, "Loan Closing Statement," properly completed and executed.

In February, 1979, approximately one year after McIntosh was approved as a loan closing attorney, the FmHA made an emergency loan to consolidate the farming debts of W. T. Tullos. The FmHA sent its check in the amount of the loan, payable to Tullos and his wife, to McIntosh, who had been selected by Tullos as the closing attorney for his loan. The check was accompanied by written loan closing instructions to McIntosh which specified how the loan proceeds were to be disbursed. McIntosh obtained the endorsement in blank of Tullos and his wife on the check, then endorsed it himself "for deposit to the FmHA Escrow Acct." and deposited it in a bank account listed as the "C. Arthur McIntosh FmHA Escrow Account." This procedure was in accordance with the FmHA's standard instructions. These

instructions also required McIntosh to prepare and file a loan closing statement with FmHA detailing how the loan proceeds had been handled. The instructions applicable to the Tullos loan required McIntosh to pay various listed debts of Tullos, and authorized McIntosh to pay himself a fee of $1,000.

In March of 1979, McIntosh submitted the required loan closing statement to the FmHA stating that all creditors had been paid according to the terms of the loan agreement. This was false. McIntosh made several unauthorized payments to himself and used the escrow funds to pay his own debts. Some of Tullos' creditors were not paid until August 1979, when McIntosh was able to return funds he "borrowed" from the escrow account. On the closing statement McIntosh listed his fee as $2,000 instead of the $1,000

authorized in FmHA's instructions. Tullos, who was hospitalized immediately after the loan check was received from the FmHA, was unaware of McIntosh's improper use of the escrow funds. At trial Tullos testified that, to the extent the escrow funds belonged to him, he had no objections to the way in which McIntosh used them.

McIntosh was charged with one count of making a false statement to the government under 18 U.S.C. section 1001, and with six counts of embezzling government property under 18 U.S.C. section 641. McIntosh moved to dismiss or sever the section 641 counts on the ground that the money in the escrow account belonged to Tullos, and not to the government. The trial court denied this motion. The jury acquitted McIntosh on all section 641 counts, but

found him guilty of making a false statement under section 1001.

II.

Section 1001 prohibits false statements to the government about a "material fact". McIntosh concedes that his loan closing statement to the FmHA was false. He argues, however, that if the district court made a finding of materiality it did so under an improper legal standard, or, if the issue was put to the jury, the court's charge to the jury was inaccurate. He also contends that the government failed to produce any evidence of materiality because no proof showed that the FmHA ever read or relied on the statement.

Materiality is a matter of law for the trial court to decide. United States vs. Winkle, 587 F.2d 705, 713 (5th Cir. 1979). The record reveals that the

district court made an explicit finding of materiality both in denying McIntosh's motion for judgment of acquittal[2] and in its charge to the jury.[3] However, the trial judge also instructed the jury that "to constitute concealment of a material fact ... it is not necessary that the agent relied or acted to a detriment, but the government must show that the concealment had the capacity to deceive the federal agency". McIntosh contends that this latter part of the charge not only submitted materiality to the jury, but also did so under an improper "capacity to deceive" or "tendency to

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2"[T]he execution and filing of this loan statement with FHA does have a tendency to deceive the government agency as to what did happen with the money."

3"Whether or not loan funds have been disbursed in accordance with Farmers Home Administration's instructions is a fact material to the proper function of the [FmHA] loan program.

to deceive properly determines whether a false statement was filed with specific intent to violate section 1001. He contends that the only proper test for materiality is whether the false statement had a "tendency to influence" agency action.

Assuming arugendo that the second quoted statement from the trial court's charge was designed to commit the materiality issue to the jury, we fail to perceive any resulting harm to McIntosh. The court's initial charge told the jury as a matter of law that a loan closing statement was material to the proper functioning of the FmHA. This instruction supplied the element of influence which McIntosh asserts section 1001 requires. The only facts which remained for the jury to find were that McIntosh made such a statement, and that

the statement was false. Moreover, the "capacity to deceive" instruction abridged no element of the statutory crime. While our decisions do state the test as "tendency" or "capacity to influence,"[4] it would make words the master of ideas to limit the concept of materiality to this phrase. In the context of this case the charge given reasonably includes both the concepts of agency deception and influence on agency decision.

McIntosh also argues that evidence of materiality was lacking because there was no showing that an FmHA employee would ever read, or base any decision on, the statement McIntosh submitted. Here again the defendant has focused too

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[4]See, e.g., United States vs. Krause, 507 F.2d 113, 118 (5th Cir. 1975); United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975).

narrowly. Our cases make clear that a statement may be material even though the Government does not actually rely on it. See, e.g., United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980). It is enough that "the potential for subversion of an agency's functioning [can] readily be inferred." United States v. Beer, 518 F.2d 168, 172 (5th Cir. 1975). The Government introduced testimony of the purposes of the FmHA program, including the fact that the specific loan agreement to Tullos called for mandatory payments to named creditors. It is readily inferable from this testimony that a statement falsely indicating that the required payments had been made subverted the agency's functions. Had McIntosh's loan closing statement promptly and truthfully revealed the fact that the loan proceeds

entrusted to him had been used, not to liquidate Tullos' farming debts, but to pay his own debts, the FmHA could have acted to protect its program from such subversion. It avails McIntosh nothing to contend that his false statements indicating the closing was routine were ignored by the FmHA, or that the government failed to prove they provoked examination. The issue more aptly is whether disclosure of the truth could have provoked the agency to action. The trial judge correctly ruled that McIntosh's statement was material in the meaning of section 1001.

III.

McIntosh's second argument is that his ability to defend the section 1001 count was prejudiced by the presence of six counts of embezzling public property under 18 U.S.C. section 641.

The jury acquitted McIntosh of all six embezzlement counts. Nevertheless, he argues that the existence of the six counts prejudiced his case in the eyes of the jury and foreclosed strategic options. According to McIntosh, the trial court should have eliminated the prejudice by dismissing or severing the section 641 counts. In McIntosh's view, the money in the escrow fund had been disbursed to Tullos, and thus was not "money . . . of the United States" under the section 641 definition. For this reason, he argues, the section 641 counts should have been dismissed.

In this circuit, whether funds are "money . . . of the United States" under section 641 is measured by the control exercised by the federal government over the ultimate disposition of the funds. While some courts have

focused on the government's property interest in embezzled funds, see United States v. Fleetwood, 489 F.Supp. 129, 133 (D.Or.1980), cases in this circuit agree that "[t]he key factor involved in this determination of federal interest is the supervision and control contemplated and manifested on the part of the government." United States v. Evans, 572 F.2d 455, 472 (5th Cir. 1978). Thus, we have held that funds embezzled from a private corporation which recovers federal student loan payments is embezzlement of federal money, United States vs. Evans, supra, 572 F.2d at 474, and that embezzlement of tuition funds paid directly to a university also violates section 641, United States v. Rowen, 594 F.2d 98, 100 (5th Cir. 1979).

Applying the test of federal supervision and control, we find that

the funds in this case were "money . . . of the United States" within the meaning of Section 641. Although "[w]e may accept the argument that when an outright grant is paid over to the end recipient . . . the money in the grant ceases to be federal", United States v. Smith, 596 F.2d 662, 664 (5th Cir. 1979), that point has not been reached in this case. Here, McIntosh received the loan check directly from the FmHA. Although the check was payable to Tullos, the FmHA agreement required that McIntosh disburse the funds in accordance with a schedule of debts drawn up by the agency. Tullos' interest in the FmHA funds was limited to endorsing the check in McIntosh's possession and collecting any surplus after McIntosh had made the disbursements required by the FmHA. McIntosh's actions were even more

closely controlled. After he acquired Tullos' endorsement, he was bound to deposit the funds in a designated FmHA escrow account, to disburse them only in accordance with specific instructions and promptly to report his compliance to the FmHA. Thus, the agency's control over the disposition of the funds was virtually complete, and the funds were "money . . . of the United States" under the section 641 definition.[5] For this reason, the

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[5] As additional evidence that the funds misused by McIntosh were "money . . . of the United States", we note that common law principles of escrow provide that title to funds held in escrow passes to the grantee only upon the performance of the agreed condition. The account in this case was unlike a traditional escrow account in that the funds were not held for Tullos pending the performance of a condition, but were to be paid directly to Tullos' creditors by the escrow agent. Nevertheless, the fact that the FmHA denominated the account an "escrow" account evinces the agency's desire to maintain control over the funds, and reinforces the conclusion that the funds were "money . . . of the United States" under this circuit's control and supervision analysis.

trial court's refusal to dismiss the charges was proper.

The trial court also properly refused to sever the section 641 charges. Severance is within the discretion of the trial court and is required only in cases of compelling prejudice. E.g., United States v. Horton, 646 F.2d 181, 186 (5th Cir. 1981). Federal Rule of Criminal Procedure 8(a) provides for joinder of offenses charged when they are based on the same act or transaction. Here, the purported acts of embezzlement were part and parcel of the section 1001 count. McIntosh's inchoate assertions of prejudice are meritless. The refusal to sever was well within the trial court's discretion.

IV.

McIntosh's final contention is that the prosecutor improperly restricted

questioning during the grand jury investigation. This argument is insubstantial. The grand jury argument was not made to the trial court and the excerpts from the grand jury transcript cited by McIntosh are not part of the appellate record. As a result, we may not consider those excerpts on appeal. See Ramirez v. Sloss, 615 F.2d 163, 167 n.1 (5th Cir. 1980).

The judgment of conviction and commitment order is

AFFIRMED.

CERTIFICATE OF SERVICE AND FILING

STATE OF MISSISSIPPI
COUNTY OF LAFAYETTE

I, Grady F. Tollison, Jr. do hereby certify that I have this day deposited in the United States mail, 40 copies of the foregoing Petition for Writ of Certiorari to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C., 20543, as well as three copies to the Solicitor General, Rex Lee, Tenth and Constitution Avenue, Washington, D.C., 20530.

This the 31st day of December, 1981.

GRADY F. TOLLISON, JR.

SWORN TO AND SUBSCRIBED before me on this the 31st day of December, 1981.

NOTARY PUBLIC

My Commission Expires: 8-3-85